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Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

JASON HECKEL,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court
Of The State of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) May a state regulate the subject lines and transmission path data of commercial advertisement email and apply civil penalties to an out-of-state sender of commercial advertisement email upon email messages that randomly arrive to residents of the state, as against the dormant implication of the Interstate Commerce Clause?

2) Is an Interstate Commerce Clause nexus of business agents or facilities required for a state to regulate the commercial advertisement email activities of an out-of-state business?

PARTIES TO THE PROCEEDINGS

Petitioner is Jason Heckel, an individual. Respondent is the State of Washington, by and through the Honorable Rob McKenna, its Attorney General.

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Edgar V. Mite Corporation 457 US 624,102 SCt 2629 (1982) 19, 20

General Motors Corp. v. Tracy, 519 U.S. 278, 287, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980)) 13

Pensacola Tel. Co. V. Western Union Tel. Co., 96 U.S. 1 (1877) 14

Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) 10, 13, 17

Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945) 16

Constitution and statutes:

U.S. Constitution:

The Commerce Clause,

U.S. Const. Art. I, § 8, cl. 3 2, 12

Washington State Statutes:

RCW 19.190.010, et sec

.... 2, 22, Appendix A at App. 1

Other Authorities:

Hamilton, Madison, and Jay, "The Federalist or The New Constitution" 1787-1788 11

Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 789 (2001) 23

CITATION OF OFFICIAL REPORT OF OPINION ENTERED

"Heckel I":

State v. Heckel. 143 Wash. 2d 824, 24 P3d 404, cert den. 434 U.S. 997 (2001)

After remand:

State v. Heckel. 122 Wash. App. 60, (2004), rev. den 153 Wash.2d 1021 (2005)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason Heckel respectfully petitions for a writ of certiorari to review the judgments of the Supreme Court and Court of Appeals of the state of Washington.

OPINIONS BELOW

The opinion of the Supreme Court of the state of Washington in *Heckel I* is attached (Appendix C, page App. 5). The judgment of the trial court, the Superior Court for King County, of the state of Washington, is attached (Appendix D, App.21). The opinion of the Court of Appeals of the state of Washington is attached (Appendix E, page App. 26).

JURISDICTION

The Court of Appeals of the State of Washington entered its opinion on June 28, 2004. The Supreme Court of a State of Washington denied review on March 1, 2005, and this Petition is filed less than 90 days thereafter. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, provides that the United States Congress shall "regulate Commerce with foreign Nations, and among the several States ..." The pertinent provisions of the Commercial Electronic Mail Act of the state of Washington RCW 19.190.010. are reprinted in the appendix to this petition. (Appendix A, page App. 1)

STATEMENT OF THE CASE

Petitioner sent large numbers of electronic mail advertisements to internet mail addresses, some of which randomly arrived in the electronic mail boxes of residents of the State of Washington.

The State brought civil legal action for injunctive relief and damages, as is recited in the Opinion of the Supreme Court of the State of Washington.

In his Answer to the Complaint, Petition alleged,

> "The Unsolicited Electronic Mail Act violates the Interstate Commerce clause of the Constitution of the United States of America, in that it would unreasonably burden and limit interstate commercial advertisement activities by a) Requiring advertisers to attempt to determine the state residency of electronic mail address holders before advertising to that electronic mail address, b) Presenting the prospect of different limitation on advertising content for

each of the fifty states, unreasonably burdening advertisers abilities to present commercial speech nationally."

Prior to trial, Petitioner filed a Motion for Summary Judgment as follows:

"COMES NOW, defendant, Jason Heckel, by and through his attorneys Dale L. Crandall, Charese Rohny, and Robert Van Siclen, and moves the Court for an order granting final summary judgment as to all claims in favor of Defendant and against Plaintiff, on the grounds that there is no genuine issue as to any material fact as to Defendant's Third Affirmative Defense (Commerce Clause of the United States Constitution), dismissing Plaintiff's Complaint and all the claims therein with prejudice, and allowing Defendant to apply for entry of final judgment, his costs and attorney fees."

The Motion was granted by the trial Court. The Order On Civil Motion Granting Defendants Summary Judgment is attached at Appendix B, page App. 4.

The State took direct review to the Washington Supreme Court. The Washington Supreme Court reversed the decision of the trial court and remanded for trial. The opinion of the Washington Supreme Court ("*Heckel I*") is attached at Appendix C, page App. 5.

On motion for summary judgment, the State presented declarations showing that Washington residents had received email messages which violated the Act. The trial court entered a judgment against the Defendant for a civil monetary penalty and for the States attorney fees and costs. The trial court Judgment is attached at Appendix D, page App. 21.

The Defendant appealed the judgment to the Washington Court of Appeals, which affirmed the trial court judgment. The

opinion of the Court of Appeals is attached at Appendix E, page App. 25.

On March 1, 2005, the Supreme Court of the State of Washington, the court of last resort, denied review of the opinion of the Court of Appeals. The order of the Washington Supreme Court denying review is attached at Appendix F, page App. 38.

REASONS FOR GRANTING THE PETITION

1. The Washington Supreme Court's decision has decided an important federal question in a way that conflicts with the decision of a United States court of appeals, specifically the decision of *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (Tenth Cir. decided November 2, 1999).

Petitioner contends that the Internet is a global infrastructure of commerce, that an e-mail address is not geopolitically located, but is instead ethereal and transient across state and national boundaries, and that therefore communications to an email address are not susceptible to state regulation under Commerce Clause principles.

Three federal courts have used the following three-question analysis, culminating in the *Johnson* decision:

1) Does the state law directly interfere with conduct occurring only outside that state's borders, even while regulating its proper intra-state concerns?

2) Even if the law regulates only commerce within its borders, do the burdens placed on commerce coming into the state unreasonably exceed any local benefit derived from it?

3) Does the law subject those conducting interstate commerce to inconsistent regulation as between the many states?

The decision of the Washington Supreme Court is contrary to the federal court analysis that has applied these tests to declare state attempts to interfere with Internet commercial communication as violations of the Commerce Clause.

The seminal case is *American Libraries Association; et al., v. Pataki, et al.*, 969 F.Supp. 160 (S.D. New York 1997). This holding has now stood for over three years, and